United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1428

B.
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-vs-

VITO M. PASTORE,

Defendant-Appellant.

Docket No. 75-1428

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,	:	Docket No. 75-1428
-vs-	:	
VITO M. PASTORE, Defendant-Appellant.	:	

PRELIMINARY STATEMENT

The appellant, Vito Pastore, was charged in a one count indictment with violating §7206(1) of Title 18, U.S.C., making it a federal offense to falsely make and subscribe an individual income tax return.

After a four day trial before the Honorable Lloyd F. MacMahon and a jury in the Northern District of New York, on September 20, 1975, the defendant was found guilty as charged.

On November 20, 1975, the defendant was sentenced pursuant to §3651 of Title 18, U.S.C. to six (6) months in a jail-type institution, followed by eighteen (18) months probation on condition that he resign as a member of the Bar of the State of New York.

This appeal was seasonably mounted by the filing

of a Notice of Appeal on November 21, 1975. The Court, by an Order dated the 23rd day of December, 1975, directed that the defendant's brief and appendix be filed on February 11, 1976, and that the Government's brief be filed on March 12, 1976.

ISSUES PRESENTED

1. Was the evidence concerning the handwriting exemplars furnished by government witnesses Cedrone and Galoni on the eve of trial self-serving and hence inadmissible?

2. Was the testimony of Cedrone that defendant received Ron-Ore checks payable to fictitious payees without any attempt to link their receipt to either the times specified in the indictment or to the checks identified in the government's Bill of Particulars, admissible and was Cedrone's testimony in this regard inadmissible hearsay?

3. Was Cedrone's testimonial assertion that the "O-R-E" in Ron-Ore referred to the defendant admissible without any preliminary attempt to establish the witness's personal first hand knowledge of such assertion?

4. Did the prosecution's summation which exhorted the jury to consider facts not in evidence deprive the defendant of a fair trial?

5. Under the facts of this case did the Court's supplemental charge constitute reversible error

as being unduly coercive?

6. Was that portion of the sentence which conditioned defendant's probation following his confinement in a jail-type institution on his resigning as a member of the Bar of New York unlawful?

STATEMENT OF FACTS

The defendant, a lawyer and a member of the Bar of the State of New York, was one of two attorneys employed by the Town of Fleming in Cayuga County, New York, to represent this township in connection with its plan to construct a sanitary sewer. J & K Pipe Company contracted with the Town in 1971 to construct the sewer line for 1.5 million dollars after the defendant in July, 1970, requested the company's agent and representative, Frank Cedrone, to bid on the project. At the time of this request Louis Contiguglia, the town's other attorney, was also present (182).* During construction Ron-Ore Soil Systems, Ltd. (hereinafter Ron-Ore) was created and succeeded J & K Pipe Company to the latter's interest in the construction contract with the Town of Fleming. Frank Cedrone, as he was with J & K Pipe Company, remained a principal employee and officer of Ron-Ore.

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* Numbers in parentheses refer to page numbers contained in the trial transcript except where preceded by the letter "a" which identifies page references in the Appendix.

The government, in making its case against the defendant produced a number of witnesses, including bank tellers employed by the Cayuga County Savings Bank of Auburn, who established that defendant on various dates in the year 1971 received the proceeds totalling $35,500.00 from thirteen checks cashed at the bank. All but two of these were checks drawn on funds of Ron-Ore held in the corporate account with Marine Midland Bank of Auburn. Two were Marine Midland Treasurer's checks purchased with Ron-Ore funds. None of the checks contained the name of the defendant as payee and only one, a check payable to John Williams in the amount of $5,000.00, was endorsed by defendant. One other check payable to an Auburn automobile dealer in the amount of $4,062.00 was used by defendant to purchase and register in his own name a 1971 Cadillac automobile.

The defendant's 1971 tax return reflected a gross income of $18,918.00 and it was conceded that $6,868.00 of that income did not represent any of the proceeds of the thirteen (13) checks previously discussed (80-81).

It was the government's theory that, in addition to the Cadillac, the defendant received the proceeds of the checks for his own use and benefit and therefore knowingly underestimated his 1971 income to the extent of the proceeds of the checks.

The defense was that the defendant who had previously represented Frank Cedrone personally as well as a number of other corporations headed by Cedrone, received the proceeds of

the checks as an agent for Ron-Ore (290-297, 370-372). That he did not receive the proceeds of the checks, except the check used to purchase the automobile, for his own use and benefit but on the contrary immediately transferred the proceeds for the use and benefit of Ron-Ore and to whom directed by Ron-Ore.*

In addition to those government witnesses who testified that the defendant received the proceeds of the various checks, the government produced Frank Cedrone and Dominick "Nick" Galoni as witnesses against the defendant. Both Cedrone and Galoni testified under a grant of immunity requested by the United States attorney and admitted that each had been previously indicted by the government for evading income taxes as a result of under-estimating substantial income that each had received from Ron-Ore during the years that Ron-Ore was constructing the Fleming sewer project.**

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* Proof that defendant used the Ron-Ore check in the amount of $4,062.00 to purchase an automobile would not be sufficient to establish that defendant under-estimated the income on the 1971 tax return.

** Frank Cedrone was indicted for underestimating his 1971 income to the extent of $187,812.00 and his 1971 tax liability to the extent of $112,491.00. This charge was dismissed after pleading to Count II of the indictment charging him with underestimating his 1972 income by some $10,517.00 and underestimating his tax liability of $2,966.00. The indictment was dismissed as to Cedrone's wife Lenora (318-319). Frank Cedrone was sentenced after Pastore's trial to 30 days jail confinement.

Dominick Galoni was indicted for underestimating his 1971 income by $10,000.00. This indictment was dismissed in exchange for his testimony against defendant, Pastore (213-214).

Cedrone admitted to his use of issuing Ron-Ore checks to fictitious persons as a means of concealing some of the income that he received from Ron-Ore and which he did not report on his individual tax returns (197). Over specific objection that Cedrone's testimony did not preliminarily establish his personal knowledge of the facts to which he was about to testify and over specific objection that his testimony related to transactions involving the defendant which were not relevant or competent to the issues raised by the indictment, Cedrone was permitted to testify that Ron-Ore representatives delivered to defendant checks payable to fictitious persons (197-198). None of these checks about which Cedrone testified were ever identified as being any of the checks which the government relied upon to prove the facts alleged in the indictment. Over objection Cedrone testified that he knew that the letters "O-R-E" in Ron-Ore when incorporated were intended to identify the defendant, Pastore (181).

Cedrone denied that any of the thirteen (13) checks, the proceeds of which were delivered to the defendant, were cashed for his personal benefit or for the use and benefit of Ron-Ore. Galoni made the same denials. In order to confirm the truthfulness of these denials by Cedrone and Galoni, the government, over specific objection that handwriting exemplars furnished by these two witnesses on the eve of defendant's trial were self-serving, was permitted to prove by expert testimony that neither Galoni nor Cedrone made or endorsed the thirteen checks cashed by

defendant (232). With the exception of Exhibit 17 which defendant did endorse with his own name the expert was not asked whether the endorsement or making of the other checks were by the defendant.*

The government proved also that as a precondition to acceptance of J & K Pipe Company's bid for 1.5 million dollars a performance bond was required insuring the company's faithful performance of the sanitary sewer construction; and that indeed a document purporting to be a copy of such a bond of the Trans-American Insurance Company was delivered by defendant to a second attorney, Louis Contiguglia, also representing Fleming on the sewer project. An agent of the TransAmerican Insurance Company testified that although the insurance company had previously provided a valid performance bond on a construction project undertaken by one of Cedrone's companies, his purported signature on the bond for the Fleming project was not his signature.

The defendant did not testify in his own behalf and during summation by defense counsel it was argued that the government failed to prove that the proceeds of twelve of the thirteen checks in evidence were received in return for services rendered by defendant to Ron-Ore. That the government therefore failed to prove that defendant received any more income in 1971 that was included in his tax return and that the defendant's

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* Exhibit 17 was a Ron-Ore check in the amount of $5,000.00 payable to one John Williams, endorsed by John Williams and Vito Pastore.

receipt of the proceeds, in view of the government's evidence, was just as consistent with the theory that the proceeds were received in trust and disbursed for and on behalf of Ron-Ore, Frank Cedrone, Dominick Galoni or suppliers to whom the Ron-Ore Corporation was indebted (348-349).

The government in its summation urged the jury to believe that defendant did render services to Ron-Ore in 1971 and hence that the proceeds of the checks were in fact 1971 income to defendant. The government argued that the evidence established a corrupt relationship between the defendant, as town attorney, Ron-Ore and Frank Cedrone and this, in spite of the failure by any witness, including Frank Cedrone, to testify precisely as to the nature of the corrupt services rendered by defendant as the quid pro quo.

In order to solidify the government's claim that its evidence pointed to a corrupt relationship, the government was permitted, over objection, to inform the jury that both Frank Cedrone and his deceased brother, Lenny, together with the defendant perpetrated a "raid" on the residents of Fleming and lined their respective pockets with monies belonging to said town residents, all of whom were hurt and adversely affected by this corrupt relationship that existed (391-392). That based upon these assertions the defense moved for a mistrial on the grounds that the evidence did not warrant imputing to the defendant the commission of a crime not alleged in the indictment (419). Defendant's motion was denied.

The Court concluded charging the jury in the late afternoon on Friday, September 19, 1975, and the jury returned to the court room at 12:08 a.m. on September 20, 1975 and asked the Court how long they were expected to deliberate.*

In responding to this question and just before giving the jury the "Allen charge", the Court stated: "Of course, that is up to you." "You are the ones who are to decide the case" (423). The jury was then told how simple a case the Court believed it to be and additionally instructed them that absolute certainty was not expected of them concerning a "yes or no" answer to the critical issue, whether or not the defendant intentionally and knowingly underestimated in 1971 income on his tax return for that year. Nowhere in the Court's supplemental instructions did the Court admonish or remind the jurors that their finding in this important regard had to be arrived at only if they were convinced of its existence beyond a reasonable doubt and that the burden of so convincing them was on the government. The jury returned its verdict of guilty some twenty minutes later (425).

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* It is not clear from the trial transcript whether the jury's question pertained to the duration of its deliberation that evening or to its deliberation the next day after sequestration that evening. The question may very well have pertained to the latter because after the jury's verdict, Judge MacMahon apologized to the jury for not being able to provide sleeping accomodations to facilitate the jurors' sequestration that evening. (423, 427-428)

ARGUMENT

POINT I

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO HAVE PERMITTED THE GOVERNMENT'S HANDWRITING EXPERT TO RENDER AN OPINION EXCLUDING CEDRONE AND GALONI AS THE MAKER OR ENDORSER OF TWELVE OF THE THIRTEEN CHECKS BASED ON HANDWRITING EXEMPLARS PREPARED BY THE WITNESSES ON THE EVE OF DEFENDANT'S TRIAL.

This expert testimony was elicited by the government to bolster the denials of Cedrone and Galoni that they had either made, endorsed or received the proceeds of the checks in evidence which were claimed by the government to have been cashed by the defendant as income to him. The handwriting exemplars were made outside the presence of the Court and jury at the request of the prosecutor and inside the secret confines of the latter's office. They were made either on the eve of the defendant's trial or during its progress and hence were self-serving declarations of witnesses whose testimony was bought and paid for by the government's request for court-directed immunity and promises of leniency. The conceded consideration for the testimony of Cedrone and Galoni against the defendant together with the immunity blessings conferred by the Court established the witnesses' motive for testifying favorably on behalf of the government. The motive to falsify was as real in this instance as the motive of a defendant when testifying on his own behalf. With respect to the latter this Court in United States v. Lam Muk Chiu, 522 F 2d 330 (2nd

Cir., 1975) affirmed the trial court's exclusion of handwriting samples made by the defendant at the request of his attorney following his arraignment on the grounds that the samples were self-serving exemplars prepared especially for trial. In so holding this Court adopted the following language of earlier precedent:

> "[A]s remarked in King v. Donohue, 110 Mass. 155, 156, 'a signature made for the occasion post l. tem motem and for the use at the trial ought not to be taken as a standard of genuineness.' 'It would,' as was said in Williams v. States, 61 Ala. 33, 40, 83, 'open too wide a door for fraud, if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for purpose of comparison'."

This Court further stated in "Lam Muk Chiu" as follows:

> " . . . Unquestionably, a defendant has a strong motive to alter his writing so as to render it dissimilar to an incriminating document alleged by the prosecution to be in his hand. Accordingly, any handwriting sample prepared for the specific purpose of showing dissimilarity of handwriting is inherently suspect and should not be admitted into evidence."
>
> (Citation omitted)

The harmful effect of this error by the trial court is incalculable in view of the admissions by Cedrone that on other occasions he had in fact issued Ron-Ore checks to fictitious

persons as payees, such as Anthony Frisco, Irv. Furlette, James and John Williams,* for either his own personal use and benefit or the use and benefit of the Ron-Ore corporation (287, 312-316). The error became even more egregious when the prosecutor commented on this self-serving testimony in his summation (390).

Galoni himself admitted that he underestimated his Ron-Ore income in 1971 to the extent of $20,000.00 representing the proceeds of company checks that he himself cashed but denied that the proceeds of checks identified as Exhibits 2, 9, 10, 12, 14, 15 and 16 were turned over to him by defendant.**

Without this expert testimony bolstering the testimonial denials of Cedrone and Galoni the jury may very well have had a reasonable doubt as to the veracity of these denials and may not have been able to conclude that the proceeds of these checks represented income to the defendant and not to Cedrone and

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* Same fictitious payees as appear on checks identified as Exhibits 3, 11, 13 and 17 in evidence against defendant.

** Exhibit 2 was a Marine Midland Treasurer's check payable to Nick Galloni in the amount of $13,300.00 and endorsed Nick Galloni.
Exhibit 9 was a Ron-Ore check for $100.00 payable to N. Galloni and endorsed N. Galloni.
Exhibit 10 was a Ron-Ore check for $200.00 payable to N. Galloni and endorsed N. Galloni.
Exhibit 12 was a Ron-Ore check for $500.00 payable to Nick Galloni, marked bonus and endorsed Nick Galloni.
Exhibit 14 was a Ron-Ore check for $140.00 payable to Nick Galloni and endorsed Nick Galloni.
Exhibit 15 was a Ron-Ore check for $300.00 paya e to Nick Galloni and endorsed Nick Galloni.
Exhibit 16 was a Ron-Ore check for $500.00 payable to Nick Galloni and endorsed Nick Galloni.

Galoni. This critical fact had to be resolved against the defendant before the jury could find him guilty.

POINT II

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT, OVER OBJECTION, TO PERMIT FRANK CEDRONE TO TESTIFY THAT THE DEFENDANT WAS THE RECIPIENT OF RON-ORE CHECKS WHEN IT BECAME BOTH OBVIOUS THAT SUCH TESTIMONY WAS BEING GIVEN WITHOUT THE FIRST HAND KNOWLEDGE OF THE WITNESS AND RELATED TO CHECKS OTHER THAN THOSE WHICH WERE IDENTIFIED IN THE GOVERNMENT'S BILL OF PARTICULARS.

Without any preliminary foundation established by the government to assure the Court and counsel for the defendant that Cedrone was about to testify to matters within his personal and first hand knowledge and relating to matters relevant to the indictment and Bill of Particulars, this witness was permitted to testify that on some unspecified and unidentified occasions, the defendant received Ron-Ore checks from some unspecified person or persons at the Ron-Ore field office in Fleming (197-198).

On at least two occasions during this portion of Cedrone's testimony, defense counsel desperately attempted to obtain a ruling from the Court forcing the prosecutor to establish the requisite preliminary assurance that Cedrone's testimony was not only relevant and material to the issues but was based on personal knowledge and not hearsay. In spite of these urgings by counsel, the Court permitted Cedrone to testify that the defendant on unspecified occasions and times obtained possession of

Ron-Ore checks payable to fictitious persons and that he gained such knowledge from his periodic perusal of the check stubs attached to the corporate check book kept in the company's field office.

In pertinent part this objectionable testimony of Cedrone is found at pp. 197-198 of the trial transcript as follows:

Examination by Mr. Lowe (the government prosecutor):

* * *

Q. To your knowledge, Mr. Cedrone, were any monies ever paid by or on behalf of Ron-Ore Soil Systems to Vito Pastore?

MR. PALMIERE: I object to the form of that.

THE COURT: Overruled.

MR. PALMIERE: I would like to know the time and place and circumstances.

THE COURT: Overruled.

Q. Were there ever any such occaions?

A. Yes, sir.

Q. Did you maintain any kind of a record of these payments?

A. Yes, sir.

Q. Could you describe for us how you maintained that record?

A. Well, at the times that we were writing the checks on the desk, I would look over the shoulder and get

the check number and the name, and the date, if possible. There were other times when they -- when my brother was in a hurry, or Marshall, and they would leave the checkbook on the table, and I would take the last check that was torn off the book, and I would take that check number. [Emphasis added]

Q. And if you got the information that way, then what, if anything, would you do?

A. If I took that information, I would enter it into a book. I took it home with me, and put it into a book.

* * *

Q. Now, approximately when, after you had observed or obtained this information, would you make the entry in your book at home?

A. The first time I saw this?

Government Exhibit 23 was identified by Cedrone as the book that he maintained and recorded the checks that he claimed were issued to the defendant. There was no attempt by the government to offer this exhibit in evidence; however, in spite of its incompetent hearsay content, defense counsel was forced to cross examine this witness as to its content. In doing so the hearsay nature of Cedrone's previous testimony became even more evident. In pertinent part this cross examination elicited the following at pp. 280-283 of the trial transcript as follows:

Q. So that when you testified yesterday that Mr.

Pastore received money from the Ron-Ore Company, is that based upon your observing that documentation in the form of check stubs to that effect?

A. Check stubs,or looking over his shoulder, when the check was being made.

Q. Looking over Mr. Marshall's shoulder?

A. Mr. Marshall, Lenny Cedrone, and when they were stamping the checks.

Q. So then, you never then saw, with regard to those checks that you observed your brother and Mr. Marshall making out, you never observed those checks being handed physically to Mr. Pastore, isn't that correct?

A. I saw checks handed to Mr. Pastore in the field office.

Q. There were a number of checks that you testified yesterday about that you did not observe pass to Mr. Pastore, isn't that correct?

A. Well, there are a lot of checks that I didn't observe, yes. But I have got to know the specific check.

Q. Now, with respect to this list that you made, you prepared that list, and made notations on that list each time you saw, observed an entry in the check stub of that checkbook?

A. Either the check stub, or peeking over somebody's shoulder, yes.

* * *

Q. Directing your attention to Government's Exhibit 23,

which purports to be this book (indicating), containing as you claim, references to checks that Mr. Pastore received --

A. (Interrupting) What checks are you talking about, sir?

Q. Well, directing your attention specifically to check No. 594 in the sum of $10,000, dated February 9th, 1971, and your notation on the side of it, "paid to Nick for Pastore."

A. Yes, I hever saw that check.

Q. You never saw that check?

A. No, sir.

Q. So your notation of that particular check came from what you observed on the checkbook, the stubs of the checkbook?

A. That, my notation of that check, and check number, the check number was on the check on the stub book, yes.

Q. That notation, and that notation was not made by you, is that correct?

A. No -- no sir.

Q. And was that notation made by Mr. Marshall, do you know that?

A. I don't know if there was a notation made. I don't know who made it.

Q. Now, with respect to those check stubs that you claim reflected checks paid for and on behalf, for and on on behalf of Mr. Pastore, do you have those check stubs

in your control?

A. No, sir.

* * *

Q. Are they in existence?

A. I do not know, sir.

* * *

It is clear that this testimony of Cedrone was intended as a sweeping and general accusation that the defendant carried on an ongoing corrupt relationship with Ron-Ore and its agents and had the decided effect of proving to the jury that the defendant received much more money from the corporation than the government was able to prove in support of the indictment. There was never any attempt by the government to identify the thirteen (13) checks, which were the subject of the indictment and Bill of Particulars, with any of the checks about which Cedrone testified. It is clear that the government's motive for introducing this testimony of Cedrone was to prejudice the defendant in the minds of the jurors by introducing irrelevant and incompetent proof showing merely that the defendant had a predisposition to commit the crime charged and not relevant to any issue contained in the indictment. The introduction of this testimony was a clear violation of Rule 404 of the Federal Rules of Evidence.

It isalso very clear that the government proved the defendant's criminal character by the use of hearsay. The record clearly demonstrates that much of Cedrone's general

testimony concerning defendant's receipt of Ron-Ore checks was not based on first hand knowledge in violation of the basic rule of evidence as recently codified in Rule 602 of the Federal Rules of Evidence. The government cleverly attempted to bolster this basic weakness in Cedrone's testimony by marking for identification but never offering in evidence Exhibit 23, which purported to represent a book documenting the delivery of Ron-Ore checks to the defendant.

POINT III

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO HAVE PERMITTED CEDRONE TO TESTIFY THAT THE "RON" OF "RON-ORE" IDENTIFIED HIM AND THE "ORE" IDENTIFIED PASTORE.

Without any attempt by a very experienced prosecutor to have Cedrone explain the basis of his knowledge, Cedrone testified as follows:

Examination by Mr. Lowe:

Q. Now, did the name, Ron-Ore, the letters R-O-N--, O-R-E, stand for anything?

A. Yes, sir.

MR. PALMIERE: I object to being immaterial.

THE COURT: Overruled.

By Mr. Lowe:

Q. What did those two words, Ron and Ore, stand for?

A. Ron, R-O-N, Cedrone, and O-R-E, Pastore.

The impact of this testimony was devastating.

Obviously it established in the minds of the jury that the defendant had an ownership interest in Ron-Ore with Cedrone as his partner; however, if this fact was true then Cedrone could certainly have easily testified to a factual basis supporting this conclusion and opinion of the witness. The error committed by the Court in permitting the prosecution to employ this questionable trial tactic was inexcusable based not only on good common judicial sense but based additionally on the clear and unmistakable language of Rule 602 of the Federal Rules of Evidence which prohibits a witness from testifying to any matter unless it is first demonstrated that he has personal knowledge of the matter.

Cedrone's lack of personal knowledge concerning this portion of his testimony was demonstrated on cross examination long after the damaging impact took its effect on the jury (303-305).

POINT IV

THE GOVERNMENT'S SUMMATION CONTAINED EFFORTS TO INFLAME THE PASSIONS OF THE JURY AND TO PREJUDICE THEM AGAINST THE DEFENDANT AND AS SUCH DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL.

The issue before the jury was whether or not the proceeds of the checks were income to the defendant and if so whether or not the defendant knowingly and intentionally underestaimated his 1971 income when he signed his tax return. The defendant on this appeal has no quarrel with the government's attempt during its summation to argue that a corrupt relationship

existed between him, Ron-Ore and the Cedrones which may have explained the income nature of the check proceeds. However also before the jury was the premise that the defendant may have been duped into receiving the proceeds of these checks and unwittingly used by Frank Cedrone, Lenny Cedrone and Dominick Galoni to conceal their withdrawal of income from Ron-Ore.

Without any legitimate purpose except to ignite the flame of prejudice against the defendant, the prosecutor urged the jury to consider facts which were not evidence in the case by contending that the defendant's conduct was not only corrupt but also resulted in the infliction of financial harm to the residents of the Township of Fleming. In this regard the Assistant United States Attorney stated:

* * *

> So finally, with regard to the government deal: there are three primary participants in this raid on the Town of Fleming: Frank Cedrone was one of them, and probably the foremost one. He is guilty, and he is convicted, and he is going to be sentenced. Lenny Cedrone is dead, and that leaves Vito Pastore. . . .
>
> * * *
>
> Now, what is the picture that emerges from this trial? Not a very pretty one, I say. It is a picture of a corrupt representative of the people of the Town of Fleming getting together with the likes of Frank and Lenny Cedrone, and just lining their pockets with all

of the money that was available in this project.

MR. PALMIERE: Your Honor, I object.

THE COURT: Please don't interrupt. I think that it is fair argument on the basis of the evidence. Whether that is what the evidence shows is for the jury. That is terrible.

MR. LOWE: The people who suffer, of course, are the people of the Town of Fleming. Vito Pastore was the town attorney, and Mr. Harold Orchard, who is the Town Supervisor, testified for us that Vito Pastore's special responsibility was --

THE COURT: (Interrupting) I might say to the jury that the defendant here is not on trial for any charge of corruption or anything of that kind. He is on trial simply and solely for deliberately and willingly and knowingly filing -- on the charge knowingly and willfully having filed a false income tax return in which he substantially under-estimated his gross income, and Mr. Lowe, I think that you should focus on that.

* * *

The Court's admonition came too late and did little to neutralize the additional prejudice that it evoked in holding the prosecutor's argument to be fair comment. In spite of an inference of corruption there was no evidence that the Town of Fleming or its inhabitants financially suffered thereby. There was no evidence that the bid made by J & K Pipe Company

(predecessor to Ron-Ore) was inflated and not pursuant to competitive bidding with other contractors. Such evidence would have been clearly irrelevant if offered by the government.

The prosecutor's reference to a "raid on Fleming" that caused suffering by the people of Fleming created a new dimension to the case by accusing the defendant with larceny. In so doing the prosecutor was again, as he did during his direct examination of Cedrone, proving the commission of another criminal act by the defendant and thereby a predisposition by the defendant to commit the crime contained in the indictment.

POINT V

IT WAS REVERSIBLE ERROR FOR JUDGE MACMAHON TO GIVE A SUPPLEMENTAL CHARGE, SUA SPONTE, AND WHICH
A) INSTRUCTED THE JURY CONCERNING THE SIMPLICITY OF THE ISSUES THEY WERE BEING ASKED TO DETERMINE;
B) INSTRUCTED THE MINORITY TO RE-EXAMINE THEIR POSITION WITHOUT A CORRESPONDING RE-EXAMINATION BY THE MAJORITY;
C) FAILED TO REMIND THE JURORS WITH RESPECT TO BURDEN OF PROOF AND REASONABLE DOUBT; AND
D) DIRECTED THEM TO CONTINUE THEIR DELIBERATIONS IN SPITE OF THE LATENESS OF THE HOUR.

Friday, September 19, 1975 was the last day of the defendant's three day trial. The jury had heard over twenty prosecution witnesses. On the last day of trial the jury began its day by listening without interruption or recess to a four

hour cross examination of the government's main witness, Frank Cedrone. When the jury returned at 2:00 p.m., the jury heard two defense witnesses and then immediately listened to both the summations of counsel and the main charge of the Court without recess. At about 5:00 p.m. the jury began its deliberation and except for a dinner recess, the jury continued its deliberation until 10:00 p.m. when further instructions were requested.

At approximately 12:08 a.m. on September 20, 1975 the jury apparently asked the Court concerning how long they were expected to continue their deliberations that evening. In this regard the following colloquy took place:

* * *

THE COURT: I am advised by the Marshall that you have asked how much longer you must deliberate.

Of course, that is up to you. You are the ones who are to decide the case. I want to say to you that this is fundamentally a pretty simple case. Did the defendant have more income in the year 1971 than he stated on his income tax return? Yes or no; to yourselves. . . . (423)

* * *

After the jury returned its verdict at 12:45 a.m. it became readily apparent that the jury's question to the Court at 12:08 a.m. was not an indication that they were deadlocked but indicated that the jury was requesting some respite from the

arduous rigors involved in the tasks assigned to the jury that day and evening; that the jury was consequently asking to continue their conscientious deliberations the next day with the advantage of clearer minds operating without the fatigue obviously experienced by anyone who has worked for fourteen continuous hours. Such an interpretation was certainly readily understood by Judge MacMahon because he stated to the jury the following:

* * *

> I was afraid that if I let you go over the weekend, the evidence would be gone from your mind. And I did not frankly think it would take you this long, as it did, to decide. I think that I could have decided it in about ten minutes. But that decision was yours, and I am sorry that you stayed so late.
>
> I had no choice other than to lock you up for the whole night, and let you deliberate tomorrow, and that wasn't feasible because there just wasn't a place where we could get you all together, and we had to have you all under one roof, but we would have had to work it out some way. (427-428)

* * *

Before directing the jury to continue its deliberations without the benefit of the requested relief, Judge MacMahon gave to the jury a supplemental or Allen type instruction and at the conclusion of which instructed the jury "to go back

into the jury room in the light of this instruction, and do your best to reach an agreement and a verdict." (Emphasis added) The supplemental instruction (a copy of which is contained in the appendix) asked the jury to arrive at a verdict based on the language of the supplemental instruction and contained no reference or reminder of their obligation to heed the Court's original instruction concerning burden of proof and reasonable doubt.

Although this Court generally has approved the use of an Allen charge, it has reviewed each charge carefully to determine whether the impact of the particular charge given was unduly coercive, and it has expressly recommended that in certain circumstances an Allen type charge may be unduly coercive. In United States v. Hynes, 424 F 2d 754 (2d Cir., cert. denied, 399 U.S. 933 (1970), this Court while upholding the particular charge given, observed:

> "There is no aggravating circumstance in this case such as foreknowledge of the numerical split, use of compromising language outside the Supreme Court statement in Allen or undue emphasis on the responsibility of the minority to suggest any coerciveness beyond the supplementary charge itself."
>
> Id. at 757

We submit that the particular wording of the supplemental charge delivered by Judge MacMahon at a time when there was no expression of a deadlock combined with the disclosure of the judge's view that the issues "were simple" and his

insistence that the jury continue their deliberation into the early morning hours, had an unduly coercive effect on the jury and, thus, constitutes reversible error.

The minority jurors cognizant of their responsibility for forcing the majority to continue with the deliberations into the early morning hours and confronted with the attitude of the Court that the issues were capable of easy (and hence quicker) resolution submitted to the consensus of the majority. The Court's characterization of the "simple issues" that were involved in this case presents one of those aggravating circumstances found missing from those cases previously before this Court when the supplemental Allen charge has been approved in spite of the failure to re-charge the principles of reasonable doubt and burden of proof.

POINT VI

THAT PORTION OF THE SENTENCE IMPOSED BY THE TRIAL COURT WHICH REQUIRES DEFENDANT TO RESIGN AS A MEMBER OF THE BAR OF THE STATE OF NEW YORK IS UNLAWFUL AND THE SENTENCE SHOULD BE MODIFIED BY DELETING SUCH CONDITION.

Upon entering judgment the trial court imposed a two year sentence providing for confinement in a jail-type institution for six (6) months and probation for the balance of eighteen (18) months if defendant resigned from the practice of law to which he was duly admitted in the Courts of the State of New York.

Defendant contends the imposition of said condition to probation is a penalty or forfeiture not provided for by statute and thereby voids that portion of the sentence imposed.

A court in sentencing a defendant may levy only those punishments or alternatives to punishment as are prescribed and fixed by Congress. Ex Parte United States, 242 U.S. 27, 37 S. Ct. 72, 61 L. Ed. 129 (1916).

Upon a conviction for a violation of Title 26, U.S.C., §7206, a defendant may be sentenced only to the penalties provided therein or alternatively, only as provided in Title 18 U.S.C. §3651.

Neither of the above sections authorize the Court to impose a forfeiture of any license to practice a given profession as a penalty for violating Title 26, U.S.C. §7206.

The Court having imposed an unauthorized penalty upon the defendant, that portion of the sentence is erroneous and void and should be deleted from the eighteen month probationary term imposed. Ex Parte United States, supra.

Defendant further contends that the sentence of probation conditioned on his resignation from the Bar constituted an erroneous and unlawful application of Title 18 U.S.C. §3651.

While Title 18 U.S.C. §3651 provides that upon being placed on probation the Court may set certain terms and conditions thereof, nowhere in the statute is there a provision authorizing the Court to set specific prerequisites to receiving such probation.

By conditioning the receipt of probation upon the defendant resigning from the practice of law, the Court is effectively legislating conditions precedent into Title 18 U.S.C. §3651. As previously stated it is within the exclusive province of Congress to fix and prescribe criminal penalties and procedures for applying same. Where a court does not comply with the letter of the criminal statute in imposing a sentence said sentence is not only erroneous but void. Mathes v. United States, 254 F 2d 938, C.A. 9th Cir. (1958).

Even assuming, arguendo, that defendant's resignation from the practice of law is a condition to continuing on probation rather than a condition precedent to receiving probation, said condition is unlawful.

As stated in Hollandsworth v. United States, 34 F 2d 423, C.A. 4th Cir. (1929), "If the probationer complies with the conditions of his probation, he is entitled to remain on probation, subject to the supervision of the court and its officers until the maximum period of sentence expires, and then he is entitled to a final discharge." Here, however, defendant is being required to relinquish a status as a condition of probation that of necessity will extend beyond his final discharge from probation. Such condition is in excess of that permitted by Title 18 U.S.C. §3651 and assumes to dictate the defendant's conduct beyond any period of probation that could lawfully be imposed.

The trial court further exceeded its jurisdiction conditioning probation upon resignation from the practice of law in that it ventured into the exclusive jurisdiction of the Supreme Court-Appellate Division of the State of New York. Pursuant to §90 of New York's Judiciary Law the members of the profession of the Bar of New York are officers of the New York Supreme Court and the Appellate Division of that Court has exclusive jurisdiction for admission to and removal from practice. Erie County Water Authority v. Western New York Water Co., 304 N Y 342, 107 N.E. 2d 479.

The defendant also contends that the sentence of probation conditioned by his resignation from the Bar constitutes a denial of due process uder the Fifth and Fourteenth Amendments to the United States Constitution. The taking away of an attorney's license to practice law is a deprivation of livelihood and can only be accomplished through judicial exercise of due process. Spevak v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L.Ed. 2d 574; Dillon v. United States, 230 F Supp. 487, reversed on other grounds, 346 F 2d 633.

Defendant during the course of the proceedings herein was never given notice that the Court intended to deprive him of his license to practice law, nor was he given notice as to the specific misconduct which would constitute disbarment, nor was he given an opportunity to offer evidence in mitigation at a proceeding specifically held for that purpose. Without these basic procedural safeguards defendant was deprived of procedural

due process. In Re Ruffalo, 390 U.S. 544, 20 L.Ed. 2d 117, 88 S. Ct. 1222.

For the above mentioned reasons the condition requiring defendant to resign from the practice of law should be deleted from the sentence imposed.

CONCLUSION

THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR ALTERNATIVELY A NEW TRIAL ORDERED OR ALTERNATIVELY THE SENTENCE SHOULD BE MODIFIED.

Dated: February 9, 1975

Respectfully submitted

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of counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-vs-

VITO M. PASTORE,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

Docket No. 75-1428

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

JUDITH HOPKINS, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Rochester, New York.

On February 10, 1976, deponent served the within Brief for Appellant and Appendix for Appellant upon James M. Sullivan, Jr., United States Attorney, Northern District of New York, George Lowe, Esq., of counsel attorneys for United States of America in this action, at Federal Building, Syracuse, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Judith Hopkins
JUDITH HOPKINS

Sworn to before me this
10th day of February, 1976.

Norman A Palmieri

NORMAN A. PALMIERI
Notary Public in the State of New York
Qualified in Monroe County
Commission Expires March 30, 1977